

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEE ROSA,

Defendant-Appellant.

FOR PUBLICATION
January 23, 2018
9:15 a.m.

No. 336445
Barry Circuit Court
LC No. 16-000438-FC

Advance Sheets Version

Before: MARKEY, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Defendant was convicted of assault with intent to commit murder, MCL 750.83; assault by strangulation, MCL 750.84(1)(b); and domestic violence, MCL 750.81(2). The convictions arose out of an assault against his ex-wife, KR, on March 6, 2016.¹ He was sentenced as a second-offense habitual offender, MCL 769.10. The sentencing guidelines provided a recommended minimum term of imprisonment of between 135 months and 281 months, but the trial court departed from the guidelines and imposed a sentence of 300 to 600 months' imprisonment for the assault-with-intent-to-commit-murder conviction. Defendant was also sentenced to 120 to 180 months' imprisonment for the assault-by-strangulation conviction and to 93 days' imprisonment for the domestic-violence conviction.

According to KR's testimony and other evidence, defendant entered KR's bedroom while she was asleep with their youngest child asleep beside her. Defendant placed a pillow over KR's face. He then put a belt around her neck and tightened it; however, KR was able to get her hand between the belt and her neck so she could still breathe. Defendant removed the belt and put it around KR's neck a second time and tightened it, cutting off KR's ability to breathe. There was physical evidence of the strangling, including bruising on KR's neck and broken blood vessels around her eyes.

Defendant raises five claims of error in this appeal—three that challenge his convictions and two that challenge his sentences. For the reasons discussed in this opinion, we affirm.

¹ At the time of the assault in this case, defendant and KR were divorced but still living together.

I. OTHER-ACTS EVIDENCE

Defendant argues that the trial court erred by admitting evidence of prior acts of domestic violence against his first wife.² The trial court ruled that the evidence was admissible under MCL 768.27b and MRE 404(b).³ We agree with defendant that this evidence was improperly admitted, but after a review of the entire record, we are confident that this error was harmless. It is highly unlikely that the evidence affected the outcome of the trial, and its admission did not undermine the reliability of that outcome. See *People v Young*, 472 Mich 130, 141-142; 693 NW2d 801 (2005); *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). We will first review the question of admissibility in relation to the statute, MCL 768.27b, and then in relation to the rule, MRE 404(b).

A. MCL 768.27b

MCL 768.27b provides that in domestic violence cases, evidence of other acts of domestic violence is admissible, even to show propensity, so long as admission of the evidence does not violate MRE 403 and the acts took place no more than 10 years before the charged offense. The statute reads in pertinent part:

(1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.

* * *

(4) Evidence of an act occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that admitting this evidence is in the interest of justice.

The prior acts testified to by defendant's first wife occurred at least 16 years before the events for which defendant was charged in this case. Per the language of the statute, those acts that occurred more than 10 years before the charged offense are inadmissible unless their admission "is in the interest of justice." The statute does not define "interest of justice."

² Defendant also argued before the trial court that KR should not be allowed to testify about defendant's prior bad acts against her; however, he does not raise this on appeal.

³ "The decision whether to admit evidence is within the trial court's discretion and will not be disturbed absent an abuse of that discretion." *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). A trial court abuses its discretion when it "chooses an outcome that falls outside the range of principled outcomes." *People v Douglas*, 496 Mich 557, 565; 852 NW2d 587 (2014) (quotation marks and citation omitted). However, when "the decision involves a preliminary question of law, [such as] whether a rule of evidence precludes admissibility, the question is reviewed de novo." *McDaniel*, 469 Mich at 412.

The prosecution argues that the evidence of prior acts occurring outside the 10-year period was admissible under the interest-of-justice exception because the evidence was probative of defendant's pattern of behavior and it did not violate MRE 403. The difficulty with this standard is that if we read the interest-of-justice exception to apply merely because the evidence is probative of defendant's propensities and it survives MRE 403 review, the 10-year limitation would have no meaning. All evidence admitted under MCL 768.27b, including evidence of acts falling within the 10-year window must be probative and must not violate MRE 403. Thus, to define "interest of justice" by such a standard would mean that evidence of prior acts that occurred more than 10 years before the charged offense would be admissible simply by showing that the evidence would be admissible if it had occurred within the 10-year window. This would render the 10-year limit essentially nugatory, and it is well settled that we must "avoid a construction that would render any part of the statute surplusage or nugatory." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011) (quotation marks and citation omitted).

For this reason, we conclude that the trial court applied the wrong standard in determining whether the testimony of defendant's first wife fell within the interest-of-justice exception. To avoid rendering the 10-year limit nugatory, the exception should be narrowly construed. Accordingly, we conclude that evidence of prior acts that occurred more than 10 years before the charged offense is admissible under MCL 768.27b only if that evidence is uniquely probative or if the jury is likely to be misled without admission of the evidence.

In this case, the testimony of defendant's first wife concerning events that occurred at least 16 years before the charged crimes was not uniquely probative. KR's testimony laid out a detailed and compelling picture of defendant as an abusive and violent husband. She described repeated verbal abuse, multiple beatings, and a rape. The older son described threatening and violent behavior as well. The prior bad acts described by defendant's first wife were neither uniquely probative nor were they needed to ensure that the jury was not misled; instead, the acts were consistent with and cumulative to KR's testimony regarding defendant's character and propensity for violence.

B. MRE 404

We next consider whether the testimony of defendant's first wife, though not admissible under MCL 768.27b, was nevertheless admissible under MRE 404. MRE 404 differs from MCL 768.27b in several ways that are relevant here. First, there is no temporal limitation in MRE 404. "The remoteness of the other act affects the weight of the evidence rather than its admissibility." *People v Brown*, 294 Mich App 377, 387; 811 NW2d 531 (2011). Unlike the statute, MRE 404 contains no bright-line cutoff based on when the other acts took place. Second, while the statute permits evidence to be admitted to show a defendant's propensity or character, MRE 404 does not. The text of the rule begins, "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion" MRE 404(a). However, MRE 404(b)(1) sets forth a nonexhaustive list of several grounds, other than propensity, for which evidence of other acts may serve as proof "when the same is material."

We conclude that the testimony of defendant's prior wife was not admissible under MRE 404(b) because the purpose of the evidence was to show that in this case, defendant acted

in conformity with the character shown by the prior acts, i.e. that defendant was threatening, abusive, and violent. The testimony of defendant's first wife demonstrated that defendant was a dangerous man and an incorrigible spouse abuser, but her testimony did not offer probative evidence on a material issue. Putting aside the fact that identity was not at issue, there was no particular pattern or scheme described by his first wife that would have served to identify defendant except to show that abusing and attacking his wives was in the nature of defendant's character. Nor did the evidence have significant, if any, probative value as to intent. Testimony about defendant's abusive treatment of his first wife many years ago tells us little, if anything, about whether defendant had an intent to kill when he strangled KR. By contrast, there is substantial evidence of defendant's intent in KR's testimony describing the actual assault at issue, i.e. that he attempted to smother her with a pillow and twice placed a belt around her neck and tightened it so that she could not breathe. Further, the photographs of KR's bruises and discoloration around her eyes from ocular petechiae⁴ were very relevant to intent because they showed that the belt was tightened around her neck for a significant period of time. Finally, defendant's 16-year-old son testified that the day after the assault against his mother, defendant was in a state of anger and repeatedly attacked him. Compared to this sort of evidence, 16-year-old assaults against a different person are barely probative of intent, if at all. And to the degree the prior acts are at all probative, under the facts of this case, they would not survive review under MRE 403 due to the danger of unfair prejudice.

C. HARMLESS ERROR

As noted, the testimony of defendant's first wife did carry significant potential for unfair prejudice because the jury could conclude that even if defendant was not guilty of the instant charge, he was a bad and dangerous man who should be incarcerated. As the Supreme Court stated in *People v Denson*, 500 Mich 385, 410; 902 NW2d 306 (2017):

[O]ther-acts evidence carries with it a high risk of confusion and misuse. When a defendant's subjective character [is used] as proof of conduct on a particular occasion, there is a substantial danger that the jury will overestimate the probative value of the evidence. The risk is severe that the jury will use the evidence precisely for the purpose that it may not be considered, that is, as suggesting that the defendant is a bad person, a convicted criminal, and that if he did it before he probably did it again. [Quotation marks and citations omitted; second alteration in original.]^[5]

⁴ Testimony at trial established that petechiae are "little red dots" on the face that represent broken capillaries and blood vessels that hemorrhaged as a result of oxygen and blood flow to the head being cut off.

⁵ See also *People v Allen*, 429 Mich 558, 569; 420 NW2d 499 (1988), in which the Supreme Court described three ways in which prior-acts evidence may prove prejudicial:

First, . . . jurors may determine that although defendant's guilt in the case before them is in doubt, he is a bad man and should therefore be punished. Second, the

Given these dangers, the Supreme Court in *Denson* instructed that harmless-error analysis should be applied with care and that “the mere presence of some corroborating evidence [of guilt] does not automatically render an error harmless.” *Id.* at 413. Rather, the Court explained that we are “to assess the effect of the error in light of the weight and strength of the untainted evidence.” *Id.* (quotation marks and citation omitted). Having done so in this case, we conclude that the properly admitted evidence of guilt was so overwhelming that exclusion of the infirm evidence could not have resulted in a different outcome. KR’s testimony was compelling and wholly unshaken by cross-examination. Her injuries were documented, visible, and unquestionably caused by strangulation. They were inflicted when defendant and KR were alone except for the presence of a sleeping child, and there is evidence that the assault occurred at a time when defendant was very angry. Moreover, KR’s testimony about defendant’s prior bad acts over the course of 10 years, which was properly admitted under MCL 768.27b, strongly supported the notion that defendant had a strong propensity toward violence and specifically violence toward KR. Thus, exclusion of the testimony of defendant’s first wife would not have spared defendant from the devastating propensity evidence that was properly admitted. Finally, defendant’s claim that KR had inflicted these injuries on herself was wholly incredible and would not have been less incredible had the testimony of his first wife been excluded.

II. JURY INSTRUCTION ON MITIGATING CIRCUMSTANCES

Defendant contends that the trial court’s refusal to instruct the jury on mitigating circumstances denied him his right to a fair trial and the right to present a defense. We disagree.⁶

“A criminal defendant is entitled to have a properly instructed jury consider the evidence against him.” *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). “The jury instructions

character evidence may lead the jury to lower the burden of proof against the defendant, since, even if the guilty verdict is incorrect, no “innocent” man will be forced to endure punishment. Third, the jury may determine that on the basis of his prior actions, the defendant has a propensity to commit crimes, and therefore he probably is guilty of the crime with which he is charged.

⁶ “This Court reviews de novo claims of instructional error.” *People v Martin*, 271 Mich App 280, 337; 721 NW2d 815 (2006). In reviewing instructional-error claims, “this Court examines the instructions as a whole, and even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant’s rights by fairly presenting to the jury the issues to be tried.” *Id.* at 337-338 (quotation marks and citation omitted). Further, we review de novo whether defendant suffered a deprivation of his constitutional right to present a defense. *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009). Because defendant failed to argue in the trial court that he was denied his constitutional right to present a defense, our review is for plain error affecting substantial rights. See *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). Plain error requires that: “1) [an] error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.” *Id.* at 763. “The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.” *Id.*

must include all elements of the crime charged, and must not exclude from jury consideration material issues, defenses or theories if there is evidence to support them.” *People v Armstrong*, 305 Mich App 230, 240; 851 NW2d 856 (2014) (quotation marks and citation omitted). Further, MCR 2.512(D)(2) requires that the jury be instructed using the Michigan Model Criminal Jury Instructions if “(a) they are applicable, (b) they accurately state the applicable law, and (c) they are requested by a party.”

Defendant argues that the trial court should have instructed the jury on the existence of mitigating factors pursuant to M Crim JI 17.4.⁷ Defendant testified that he was suicidal, if not psychotic, on the night of the assault, that he was highly emotional, and that he was under the influence of nonprescribed medication. Accordingly, he argues that had the court given the requested instruction, the jury would have concluded that he was acting out of passion.

The trial court properly declined to give the mitigating-circumstances instruction because defendant did not offer evidence that his “emotional excitement” was “caused by something that would cause an ordinary person to act rashly” and because, as the trial court pointed out, this assault “happened over the course of time” not in a sudden impulsive act. Indeed, the testimony showed that defendant was calm when he went into the bedroom. In sum, there was no evidence that defendant acted in the heat of passion, which was caused by something that would create

⁷ M Crim JI 17.4 provides:

(1) The defendant can only be guilty of the crime of assault with intent to commit murder if [he / she] would have been guilty of murder had the person [he / she] assaulted actually died. If the assault took place under circumstances that would have reduced the charge to manslaughter if the person had died, the defendant is not guilty of assault with intent to commit murder.

(2) Voluntary manslaughter is different from murder in that for manslaughter, the following things must be true:

(3) First, when the defendant acted, [his / her] thinking must have been disturbed by emotional excitement to the point that an ordinary person might have acted on impulse, without thinking twice, from passion instead of judgment. This emotional excitement must have been caused by something that would cause an ordinary person to act rashly or on impulse. The law does not say what things are enough to do this. That is for you to decide. . . .

(4) Second, the killing itself must have resulted from this emotional excitement. The defendant must have acted before a reasonable time had passed to calm down and before reason took over again. The law does not say how much time is needed. That is for you to decide. The test is whether a reasonable time passed under the circumstances of this case.

(5) If you find that the crime would have been manslaughter had the person died, then you must find the defendant not guilty of assault with intent to murder [Bracketed material in original.]

such a state in an ordinary person. See *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). Accordingly, there was no error.

Related to his argument of instructional error, defendant claims that the lack of a mitigation instruction denied him his right to present a defense. We disagree. First, defendant testified that he never assaulted the victim. He acknowledged that he put the belt over the victim's head, but he contended that he never tightened it around her neck. He did not testify that he assaulted the victim because of the stress of the events leading up to the incident. As a result, he has failed to show how the trial court's refusal to include the mitigating-circumstances instruction denied him his constitutional right to present a defense.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that he was denied the effective assistance of counsel. We disagree.⁸

To prevail on a claim of ineffective assistance of counsel, a defendant must establish that “(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different.” *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). “A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that, but for counsel's error, the outcome of the trial would have been different.” *Id.*

Defendant claims that counsel was ineffective when he asked for a police officer's opinion, during cross-examination, on whether defendant had an intent to murder the victim. Defendant's assertion is based on the following exchange between defense counsel and the police officer involved in the investigation of the case:

Q. Okay. And on the night in question, between him and [KR], you don't know what his intent is that night, correct?

A. I absolutely believe that his intent was to—

Q. I didn't ask what you believe. I asked what you know.

⁸ “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's “factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo.” *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). However, because defendant failed to move for a new trial or an evidentiary hearing, this Court's review of his ineffective assistance of counsel claim is limited to errors apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

A. I—based on the evidence and the total—totality of the circumstances, it would show that his intent was to murder [KR] that night.

Q. All right. Thank you.

Defendant’s claim that defense counsel asked for the police officer’s opinion is not supported by the record. In fact, defense counsel specifically stated, “I didn’t ask you what you believe. I asked what you know.” In context, the question was to show that the officer did not have any knowledge of defendant’s intent during the assault, which was a legitimate strategy based on the charges and the testimony. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008) (holding that “[d]ecisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy”). This Court “will not second-guess counsel on matters of trial strategy, nor [will it] assess counsel’s competence with the benefit of hindsight.” *Id.* Defendant has not shown that he was denied effective assistance of counsel.

IV. SENTENCING

Defendant argues that he is entitled to resentencing because the trial court’s improper scoring of Offense Variables (OVs) 3, 4, and 7 altered the advisory sentencing range. We disagree.⁹

First, defendant argues that the trial court improperly scored OV 7 at 50 points. MCL 777.37 provides in pertinent part:

(1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 by determining which of the following apply and by assigning the number of points attributable to the 1 that has the highest number of points:

(a) A victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense 50 points

(b) No victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense 0 points

“OV 7 is designed to respond to particularly heinous instances in which the criminal acted to increase [a victim’s] fear by a substantial or considerable amount.” *People v Glenn*, 295 Mich App 529, 536; 814 NW2d 686 (2012), rev’d on other grounds by *People v Hardy*, 494

⁹ “Issues involving the proper interpretation and application of the legislative sentencing guidelines . . . are legal questions that this Court reviews de novo.” *People v Ambrose*, 317 Mich App 556, 560; 895 NW2d 198 (2016) (quotation marks and citation omitted). The trial court’s “factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence.” *Id.*

Mich 430, 434; 835 NW2d 340 (2013). For purposes of OV 7, “excessive brutality means savagery or cruelty beyond even the ‘usual’ brutality of a crime.” *Glenn*, 295 Mich App at 533. Although “all crimes against a person involve the infliction of a certain amount of fear and anxiety,” the trial court “may consider conduct inherent in a crime” when scoring OV 7. *Hardy*, 494 Mich at 442 (quotation marks and citation omitted).

“[A] defendant’s conduct does not have to be similarly egregious to sadism, torture, or excessive brutality for OV 7 to be scored at 50 points, and . . . absent an express statutory prohibition, courts may consider circumstances inherently present in the crime when scoring OV 7.” *Hardy*, 494 Mich at 443 (quotation marks omitted). Rather, “[t]he relevant inquiries are (1) whether the defendant engaged in conduct beyond the minimum required to commit the offense; and, if so, (2) whether the conduct was intended to make a victim’s fear or anxiety greater by a considerable amount.” *Id.* at 443-444.

The record supports the trial court’s determination that OV 7 should be assigned 50 points. Defendant attempted to strangle or suffocate KR three times over the course of the assault. Further, at the outset of the assault, KR’s five-year-old child was asleep next to her. When the child awoke in the middle of the assault, defendant told the child to say goodbye to her mother and that her grandmother would take good care of her. Finally, it appears that defendant intended to rape KR while he was strangling her. Based on this evidence, the trial court properly found, by a preponderance of the evidence, that defendant’s conduct was excessively brutal, that it went beyond what was required to complete an assault with the intent to kill KR, and that it was designed to substantially increase KR’s fear and anxiety.

Defendant also contends that the trial court improperly scored OV 4 at 10 points. “Offense Variable 4 concerns psychological injury to a victim and directs a sentencing court to assess 10 points if ‘[s]erious psychological injury requiring professional treatment occurred to a victim[.]’ ” *People v McChester*, 310 Mich App 354, 356; 873 NW2d 646 (2015), quoting MCL 777.34(1)(a) (alterations in original). MCL 777.34(2) requires a court to “[s]core 10 points if the serious psychological injury may require professional treatment” but states that “[i]n making this determination, the fact that treatment has not been sought is not conclusive.”

Here, KR testified in detail about the terror she experienced during the lengthy assault and her fear for the fate of her children, which defendant exploited to increase her suffering. KR testified that she did not call anyone for help that night because she was too afraid to do so. A social worker and police officer both testified that KR appeared too frightened to speak to them when they visited the family home. A second police officer interviewed KR at the police station and testified that KR looked directly at the ground and would not make eye contact. Further, during defendant’s sentencing, KR stated that she was in counseling and was working through the situation together with her children. Defendant’s Presentence Investigation Report also stated that KR reported that she and her children were in counseling.

Because the evidence showed that KR experienced a terrifying ordeal, and actually sought professional counseling after the assault, defendant’s claim of error regarding OV 4 fails.

Defendant also argues that the trial court improperly scored OV 3 at 25 points. “Offense variable 3 is physical injury to a victim.” MCL 777.33(1). OV 3 should be scored at 25 points

when “[l]ife threatening or permanent incapacitating injury occurred to a victim.” MCL 777.33(1)(c). OV 3 should be scored at 10 points when “[b]odily injury requiring medical treatment occurred to a victim.” MCL 777.33(1)(d). OV 3 should be scored at 5 points when “[b]odily injury not requiring medical treatment occurred to a victim.” MCL 777.33(1)(e).

At the sentencing hearing, defendant objected to the scoring of OV 3, arguing that KR only suffered bruising to her neck and that there was no testimony that the injuries KR suffered were life-threatening. The defense also pointed out that KR did not seek any medical treatment that night or in the following days and that she was able to go to work the next day and was not incapacitated. Therefore, defendant contended that OV 3 should be scored at 5 points, rather than 25. The trial court disagreed, stating that KR’s injuries and the cause of those injuries were life-threatening because strangulation can cause death.

The trial court was correct that the assault could have ended in KR’s death had defendant been able to complete his intended murderous assault. However, OV 3 does not assess whether a *defendant’s actions* were life-threatening; rather, OV 3 assesses whether a *victim’s injuries* were life-threatening. See *Peltola*, 489 Mich at 181 (holding that the words in a statute are interpreted “in light of their ordinary meaning and their context within the statute . . .”). The issue may be more easily considered in the context of a shooting for which a defendant is charged with assault with intent to murder. If the gunshot resulted in the victim’s nearly bleeding to death, the victim suffered a life-threatening injury, and OV 3 should be scored accordingly. Conversely, if the defendant was a poor shot and the victim received only a minor wound that did not place his or her life in danger or permanently incapacitate him or her, OV 3 should not be scored at 25 points.

Applying that standard to this case, we conclude that OV 3 was properly scored. The evidence demonstrated that the strangulation continued until KR was near death. She had petechiae around her eyes, a phenomenon that results from an extended period of strangulation and is the result of increasing venous pressure in the head and anoxic injury to the vessels. In addition, KR suffered extensive external and internal bruising to her throat demonstrating an extended period during which her airway was shut down, depriving her brain of oxygen. Finally, the severity of the injury caused KR to lose control of her bowels.

This is not to say that the act of strangulation is always enough to score OV 3 at 25 points. However, when the evidence shows that the strangulation was severe enough and continued long enough such that the victim lost consciousness or control over bodily functions—albeit temporarily—it demonstrates that the anoxic injury was severe enough to be life-threatening.

Finally, defendant claims that his minimum sentence of 300 months (25 years) was an unreasonable and disproportionate upward departure from his recommended guidelines range. We disagree.¹⁰

¹⁰ “We review a trial court’s upward departure from a defendant’s calculated guidelines range for reasonableness.” *People v Walden*, 319 Mich App 344, 351; 901 NW2d 142 (2017). “[T]he reasonableness of a sentence [is reviewed] for an abuse of the trial court’s discretion.” *Id.*

“[A] departure sentence may be imposed when the trial court determines that ‘the recommended range under the guidelines is disproportionate, in either direction to the seriousness of the crime.’ ” *People v Steanhouse (On Remand)*, 322 Mich App 233, 238; ___ NW2d ___ (2017) (citation omitted). “An appellate court must evaluate whether reasons exist to depart from the sentencing guidelines and whether the *extent* of the departure can satisfy the principle of proportionality.” *Id.* at 239. “The first inquiry in our reasonableness review is whether there were ‘circumstances that are not adequately embodied within the variables used to score the guidelines.’ ” *Id.*, quoting *People v Milbourn*, 435 Mich 630, 659-660; 461 NW2d 1 (1990).

Defendant’s sentencing guidelines score resulted in a recommended minimum sentence range of 135 to 281 months of imprisonment for his assault with intent to commit murder conviction. However, the trial court sentenced defendant, as a second-offense habitual offender, to 300 to 600 months’ imprisonment, a departure of 19 months over the maximum minimum sentence. In support of the upward departure, the trial court cited defendant’s history of abusing KR throughout the marriage, which ultimately culminated in the charged offenses that occurred while KR’s young child was in the bed next to her. Further, the trial court noted that defendant intended to rape the victim while he was strangling her and that there were three incidents of attempted strangulation during the assault. Finally, the trial court stated that given defendant’s lengthy history of domestic violence, it believed that defendant was dangerous, that his abusive conduct was likely to continue, and that he was not a good candidate for rehabilitation.

Considering the record and the trial court’s statements in support of the sentence, the trial court did not abuse its discretion in departing from the guidelines when sentencing defendant. Defendant’s long history of abusing KR, the presence of a child during the assault, and the damage done to a family of four children were not fully accounted for by the guidelines. We also conclude that the extent of the departure was not disproportionate. The departure was 19 months from a guidelines maximum of 281 months, a proportional increase given the nonguidelines considerations and which, in percentage terms, was an increase of approximately 7%. As a result, the sentencing departure was “proportionate to the seriousness of the circumstances surrounding the offense and the offender.” *Milbourn*, 435 Mich at 636.

Affirmed.

/s/ Jane E. Markey
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola